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No. 07-1356

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

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QUESTIONS PRESENTED

1. Whether a criminal defendant's voluntary statement obtained in the absence of a knowing and voluntary waiver of the Sixth Amendment right to counsel is admissible for impeachment purposes.

2. Whether there is any right to counsel to be waived when the police have merely placed an informant in defendant's jail cell and the informant does not engage in interrogation or its equivalent.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The ruling of the Kansas Supreme Court in this case places an unnecessary obstacle in the police's ability to

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

continue the investigation of facts surrounding a crime after a person has been charged with a crime. Adoption of the rule will effectively bar any evidence obtained by an undercover government informant in jail once criminal proceedings have begun. The decision has been made without regard for the reliability of any of the evidence obtained by the informant. The hostility to the use of informants needlessly hampers legitimate police investigation, depriving courts and juries of voluntary, and, in some circumstances, highly probative confessions. This rule places unreasonable limits on investigation and is contrary to the rights of victims which CJLF was formed to serve.

SUMMARY OF FACTS AND CASE

In 2004, after several days and nights of methamphetamine and marijuana abuse, Donnie Ray Ventris and his live-in girlfriend, Rhonda Theel, decided to pay a visit to Ernest Hicks. *State* v. *Ventris*, 285 Kan. 595, 597, 176 P. 3d 920, 922 (2008). Theel believed that Hicks was abusing the children of his live-in girlfriend. *Id*., at 596-597, 176 P. 3d, at 922. She also believed Hicks was wealthy and often carried around $500 to $600. *Ibid*. Theel arranged for her friend, Martha Denton, to meet her and Ventris for a ride. *Id*., at 597, 176 P. 3d, at 922. Denton arrived with her boyfriend, Keith Holt. *Ibid*. Holt drove Theel and Ventris to Hicks' home. *Ibid*.

When they arrived, Theel went to the door while Ventris waited by the car. *Id*., at 597, 176 P. 3d, at 923. Before Holt left, he saw Ventris pull a ski mask down over his face. *Ibid*. It was five to ten degrees Fahrenheit that day. *Ibid*.

"While Theel and Ventris were inside Hicks' residence, one or both of them shot and killed Hicks . . . ."

Ibid. The two took Hicks' wallet, approximately $300, Hicks' cell phone, and his truck. *Ibid.* Denton and Holt contacted police after developing a suspicion that Theel and Ventris had been involved in Hicks' murder. *Ibid.* Both Theel and Ventris were arrested and charged. *Ibid*.

Ventris was charged with felony murder, aggravated robbery, aggravated burglary, felony theft, and misdemeanor theft. *Id*., at 598, 176 P. 3d, at 923. In exchange for her testimony against Ventris, Theel pled guilty to aggravated robbery and aiding a felon. *Ibid*. At Ventris's trial, Theel testified it was Ventris who brought the gun into the home, took Hicks into the bedroom, and shot him three times. *Ibid*.

Ventris's testimony contradicted Theel's account. Ventris testified that Theel had brought the gun to Hicks' home, and he had never intended to rob Hicks. *Ibid*. Ventris testified that although he physically struggled with Hicks, it was Rhonda Theel that pulled out the gun and demanded Hicks' money. *Id*., at 598, 176 P. 3d, at 924.

After Ventris testified, the State offered rebuttal testimony from Ventris's cellmate, Johnnie Doser. *Ibid*. In his rebuttal testimony, Doser stated that he was approached by the police to be Ventris's cellmate. J. A. 146. Without promising to grant Doser any favors, the police told Doser "[j]ust to keep [his] ear open and listen" in case Ventris commented on his crimes. J. A. 146-147. On the first day, the two men did not speak much. *Ventris*, 285 Kan., at 616, 176 P. 3d, at 934 (McFarland, C.J., dissenting). "On the second day, Doser told Ventris he could tell by the look in his eyes that he had something more serious weighing on his mind." *Ibid.* Doser testified that Ventris told him "[t]hat him and his girlfriend, Rhonda, had went to rob somebody and that it went sour. He'd shot this man in

the head and in the chest. That he took his keys, his wallet, about $350.00, and took a vehicle." J. A. 150. On cross-examination, Doser testified he did not ask any questions but just let Ventris talk. J. A. 155.

Ventris's counsel objected to this testimony claiming it had been obtained in violation of his Sixth Amendment right to counsel. *Ventris*, 285 Kan., at 599, 176 P. 3d, at 924. Although the trial court believed case law allowed Doser's placement in the cell, the State conceded that Doser was placed in the cell, "and there's probably a violation." J. A. 143. According to the State, however, case law allowed the testimony in order to impeach Ventris. *Ibid*. The trial judge overruled Ventris's objection without finding a constitutional violation. *Ibid*.

The jury, who had been instructed to consider the testimony of both Theel and Doser "with caution[,]" J. A. 30, convicted Ventris of aggravated burglary and aggravated robbery. *Ventris*, 285 Kan., at 599, 176 P. 3d, at 924. The jury acquitted Ventris of the felony murder and misdemeanor theft. *Ibid*.; see also J. A. 163. Ventris was sentenced to 247 months for aggravated robbery and 34 months for aggravated burglary. *Ventris*, *supra*, at 599, 176 P. 3d, at 924. The state Court of Appeals affirmed in a decision without a published opinion. *State* v. *Ventris*, 142 P. 3d 338 (Kan. App. 2006). The Kansas Supreme Court reversed the convictions and vacated the sentences. 285 Kan., at 608, 610, 176 P. 3d, at 929, 930.

This Court granted certiorari on October 1, 2008.

SUMMARY OF ARGUMENT

The question presented by petitioner relates to the admissibility for impeachment of evidence obtained

without a waiver of the right to counsel during a conversation between a defendant awaiting trial and an undercover informant. Fairly included in that question is whether there was any Sixth Amendment right to waive.

The Sixth Amendment rule, as established in *Massiah* v. *United States* and *United States* v. *Henry*, is that once a person is charged and requests representation, the police may not interrogate that person about the charged offense without the assistance of counsel. Listening to that person's voluntary confession, however, is acceptable. The clear rule of *Kuhlmann* v. *Wilson* allows confessions obtained by the passive listener. The rule should not be obscured because of a hostile fear of surreptitious police conduct.

At its core, the Sixth Amendment is meant to assure a person assistance in his trial defense. As the complexities of trial preparation have developed, the right to counsel has been extended to include some of the events leading up to trial, such as pretrial lineups. The right has not yet been extended to the limits proposed by the Kansas Supreme Court. An "egregious" constitutional violation does not occur every time the prosecution uses information obtained from government informants; Sixth Amendment violations occur only when an informant interrogates the accused.

Extension of *Massiah* to obscure the established rule is unnecessary. *Massiah* was established without historical justification, and, instead of extending its reasoning, this Court has generally reined in its application. Furthermore, in the present case, the need to extend *Massiah* is extremely limited. The testimony of jailhouse informants is viewed with an inherent skepticism, and its credibility can be challenged at trial. The basic protections of *Massiah* are unnecessary here, as

the accused has not been subject to coercion or the intricate procedures of the criminal law.

The Kansas Supreme Court's rule extended *Massiah* protections at the expense of *Kuhlmann* v. *Wilson*, the precedent most relevant to this case. It established a blanket prohibition against the use of jailhouse informants in these circumstances and barred their testimony whether reliable or not. The rule's inconsistency with general Sixth Amendment principles should be addressed, and the Kansas Supreme Court's ruling should be reversed.

ARGUMENT

I. Whether there was a Sixth Amendment violation at all is fairly included in the question presented.

Petitioner asks this Court to clarify whether "in the absence of a knowing and voluntary waiver of the right to counsel" a statement may be admissible for impeachment purposes. Pet. for Cert. 2. The impeachment question raised by Petitioner assumes that a Sixth Amendment violation resulted from a "police-initiated interrogation." See *Michigan* v. *Jackson*, 475 U. S. 625, 636 (1986). But the facts of this case do not clearly demonstrate that this was the type of "police-initiated interrogation" that violates the Sixth Amendment. Before limited admissibility for impeachment is addressed, it should be determined whether the police tactics used in this case violated the Sixth Amendment at all. *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), held that mere placement of an agent in a jail cell does not create the "police-initiated interrogation" that constitutes a "critical stage" for the purpose of Sixth Amendment jurisprudence. To fully resolve the Sixth Amend-

ment issues of this case, a discussion of *Wilson* and its holding is necessary.

The questions properly before the Court include the questions presented in the certiorari petition and any "subsidiary question fairly included in the question presented." *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994); Supreme Court Rule 14.1(a). Whether Ventris had a right to counsel in his cell is "fairly included in the question presented" and a "necessary predicate" to determining whether the evidence at issue in this case was admissible. See *Bohlen*, *supra*, at 390. In this case, if it is determined that Ventris's right to counsel was not violated, resolution of whether a statement obtained in violation of that right is admissible for the limited purpose of impeachment is not necessary. In *Ohio* v. *Robinette,* 519 U. S. 33, 35 (1996), the question presented was whether an advisement was required before asking a lawfully stopped motorist for consent to search. The question of whether the motorist really was lawfully stopped at that point was "a 'predicate to an intelligent resolution' of the question presented and therefore 'fairly included therein.' " *Id*., at 38. As it was in *Robinette*, the lawfulness of the police's initial action is a "necessary predicate" to the question of the lawfulness of the subsequent action.

II. The *Massiah* rule lies outside the core concerns of the Sixth Amendment.

An educated layman who simply read the Bill of Rights and then read the facts of this case would find it very strange that the Sixth Amendment is involved at all. Both the specific question of self-incrimination and the general question of a fair trial (due process) are governed by the Fifth Amendment. A brief review of

how we got here is in order to place the specific question in context.

A. The Path to Massiah.

At its core, the Sixth Amendment is meant "to assure 'Assistance' at trial, when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U. S. 300, 309 (1973). From ratification until 1932, the defendant's constitutional right "to have Assistance of Counsel for his defence[,]" meant only that courts could not prohibit a defendant from retaining counsel for a criminal trial if he so desired. See E. Hickok, The Bill of Rights: Original Meaning and Current Understanding 367 (1991). For many years, this Court "held that confessions made by indigent defendants prior to state appointment of counsel are not rendered involuntary, even in prosecutions where convictions without counsel violate due process under the Fourteenth Amendment." *Crooker* v. *California*, 357 U. S. 433, 438 (1958) (citing *Brown* v. *Allen*, 344 U. S. 443, 474-476 (1953); *Stroble* v. *California*, 343 U. S. 181, 196-198 (1952); *Gallegos* v. *Nebraska*, 342 U. S. 55, 64-68 (1951)). When it came to confessions, the Sixth Amendment right to assistance was violated only if a defendant was "so prejudiced . . . as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the concept of justice.' " *Crooker*, *supra*, at 439 (quoting *Lisenba* v. *California*, 314 U. S. 219, 236 (1941)).

The following year, the defendant in *Spano* v. *New York*, 360 U. S. 315, 320 (1959), sought to distinguish *Crooker* on the ground that he had been indicted before the interrogation. The majority found it unnecessary to resolve this question, reversing on voluntariness grounds, see *ibid*., but two concurring opinions accepted

this argument. See *id*., at 324-326 (Douglas, J., concurring); *id*., at 326-327 (Stewart, J., concurring). Both opinions are conclusory and include no historical examination of the Sixth Amendment.

Finally, in *Massiah* v. *United States*, 377 U. S. 201 (1964), the rule proposed in *Spano* was adopted. Like the *Spano* concurrences, the *Massiah* opinion is devoid of historical support for the rule it adopted. The primary authorities cited are the *Spano* concurrences and post-*Spano* New York state cases. See *id*., at 204-205, and n. 5.

The *Massiah* opinion asserts,

> "This view *no more* than reflects a constitutional principle established as long ago as *Powell v. Alabama*, 287 U. S. 45, where the Court noted that, '. . . during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself.' *Id*., at 57." *Id*., at 205 (emphasis added).

In fact, this view asserts a great deal more than *Powell* v. *Alabama*, 287 U. S. 45 (1932). *Powell* was a capital case where "until the very morning of trial, no lawyer had been named or definitely designated to represent the defendant." *Id*., at 56. Hence they had no assistance at all in the pretrial preparation phase. See *id*., at 57. The pretrial right to counsel in *Powell* was the right to the usual preparations for trial that retained counsel would make. To say that a right to counsel in a defendant's conversation with his accomplice reflects no more than the *Powell* principle is absurd. As an analysis by the Office of Legal Policy later concluded,

"The *Massiah* doctrine . . . [has] no support in history . . . ." Office of Legal Policy, Report to the Attorney General on the Sixth Amendment Right to Counsel Under the Massiah Line of Cases (1986), reprinted in 22 U. Mich. J. L. Ref. 661, 664 (1989). "The doctrinal underpinnings of *Massiah* have been largely left unexplained . . . ." *United States* v. *Henry*, 447 U. S. 264, 290 (1980) (Rehnquist, J., dissenting); see also *Massiah*, 377 U. S., at 209 (White, J., dissenting) ("so far unarticulated").

B. A Rule in Search of A Reason.

Massiah transformed the right to assistance of counsel at trial and in necessary preparation before trial into a regulation of pretrial conduct by the police. The absence of a foundation for this doctrine helps explain some of the inconsistencies in the cases mapping its scope.

The high water mark in the definition of the "critical stages"—where the defendant has a right to the presence of counsel—can be found in the lineup case, *United States* v. *Wade*, 388 U. S. 218, 226 (1967), where the right is said to extend to "any stage . . . where counsel's absence might derogate from the accused's right to a fair trial." Given the possibilities implied by the word "might," this would be a revolutionary rule, sweeping in grand jury proceeding and police interviews of witnesses among many other activities, but it has not been so applied. See Uviller, Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 Colum. L. Rev. 1137, 1157-1158 (1987). Adverse consequences alone were found insufficient to trigger the Sixth Amendment "critical stage" right in *Moran* v. *Burbine*, 475 U. S. 412, 431-432 (1986).

The Sixth Amendment right has been limited to events after the formal initiation of proceedings. See *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991); *Texas* v. *Cobb*, 532 U. S. 162, 167-168 (2001). This limitation of the rule seems oddly detached from the reasons advanced for the rule. Neither the perceived need to assure that the trial is not reduced to a mere formality, see *Wade*, 388 U. S., at 224, nor the need for professional assistance in dealing with a professional adversary, see *United States* v. *Ash*, 413 U. S. 300, 313 (1973), is affected in the least by the timing of an interrogation or lineup before or after indictment.

For a doctrine based entirely on its practical effects to be bounded by a limit having nothing to do with practical effects is strange. This anomaly is just one more indication that the entire *Massiah* rule is a house of cards. It is not a fundamental right that is a part of our nation's heritage. The Kansas Supreme Court's denunciation of the police tactics as "particularly egregious," *State* v. *Ventris*, 285 Kan. 595, 607, 176 P. 3d 920, 929 (2008), is strange enough when one considers the strong argument that the police were within the bounds of the rule as established by this Court. See Part III, *infra*. But it is doubly strange when one considers that the rule itself is completely lacking any constitutional foundation.

III. *Wilson*, not *Henry*, is the controlling precedent in this case.

When the Kansas Supreme Court rejected the State's impeachment argument in *State* v. *Ventris*, 285 Kan. 595, 176 P. 3d 920 (2008), it emphasized that Ventris's statements were made to a jailhouse informant. *Id*., at 603, 176 P. 3d, at 926. In stressing this point, the court relied heavily on *United States* v.

Henry, 447 U. S. 264, 270 (1980), which in turn had relied on *Massiah* v. *United States*, 377 U. S. 201 (1964). From *Massiah* and *Henry*, the state court derived a rule that "[w]ithout a knowing and voluntary waiver of the right to counsel, the admission of the defendant's uncounseled statements to an undercover informant who is secretly acting as a State Agent violates the defendant's Sixth Amendment rights." *Ventris*, *supra*, at 606, 176 P. 3d, at 928. In light of *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), this decision misses the mark.

To reach its decision, the Kansas Supreme Court relied on its 1975 decision in *State* v. *McCorgary*, 218 Kan. 358, 543 P. 2d 952 (1975), cert. denied, 429 U. S. 867 (1976). *McCorgary* provided the foundation for the court's finding "that the State initiated the contact with the jailhouse informant and arranged to secretly monitor the defendant's statements . . . ", an act "the State knew . . . violated Ventris's *Sixth Amendment* rights." *Ventris*, 285 Kan., at 607, 176 P. 3d, at 929 (emphasis in original). But as the dissenting opinion points out, reliance on *McCorgary* to support a federal Sixth Amendment right is in error. See *id*., at 616-617, 176 P. 3d, at 933-934 (McFarland, J., dissenting). *McCorgary* was decided before *Wilson*, a decision that squarely holds the Sixth Amendment is not violated when the State asks an informant to act as a listening post, or to monitor the statements of the accused. See *Wilson*, 477 U. S., at 459.

In the time period between *Massiah* and *Henry*, this Court repeatedly refused to find that the Constitution protected the defendant from information disclosed to government informants pretrial. "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the condition of

human society. It is the kind of risk we necessarily assume whenever we speak." *Hoffa* v. *United States*, 385 U. S. 293, 303 (1966) (quoting *Lopez* v. *United States*, 373 U. S. 427, 465 (1963) (Brennan, J., dissenting)). However, *Henry* found the right to counsel to prohibit use of a confession given to a government informant in the jail cell. 447 U. S., at 273-274.

Relying on *Massiah*, the *Henry* Court stated the question as "whether, under the facts of this case, a Government agent had 'deliberately elicited' incriminating statements from Henry." *Id*., at 270. For the majority, "deliberate elicitation" was not the result of direct interrogation. Instead, factors including Henry's incarceration, and the possibility that "confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents[,]" led the Court to believe a "critical" pretrial event, requiring the assistance of counsel, had occurred. See *id*., at 269, 274-275.

For concurring Justice Powell, however, incarceration was not a reason to extend Sixth Amendment protection. Justice Powell believed Sixth Amendment protection should be invoked when the government's conduct reached the "functional equivalent of interrogation." *Id*., at 277 (Powell, J., concurring). More clearly, Sixth Amendment protection is necessary when "the informant's actions constituted deliberate and 'surreptitious interrogatio[n]' of the defendant. If they did not, then there would be no interference with the relationship between client and counsel." *Id*., at 276. While Justice Powell believed *Massiah* to protect against the act of deliberately eliciting incriminating information from an indicted defendant, *id*., at 275, the majority found *Massiah* to encompass the intentional creation of "*a situation* likely to induce Henry to make incriminat-

ing statements without the assistance of counsel . . . ." *Id*., at 274 (emphasis added).

As Justice Blackmun noted in dissent, *Henry* purported to retain the "deliberately elicited" test but "sap[ped] the word 'deliberately' of all significance," see 447 U. S., at 279, and then went on to misapply even that expanded test. See *id*., at 282. Fortunately, this regime did not last long. *Kuhlmann* v. *Wilson* restored a reasonable limit to the *Massiah* rule.

In *Wilson*, the defendant was charged with the robbery of a taxi garage and the murder of its night dispatcher. 477 U. S., at 438-439. He was placed in a cell with Lee, a man who had agreed to act as a government informant. *Id*., at 439. The informant had been instructed only to listen and not to ask questions. *Ibid.* When Wilson made incriminating statements in response to Lee's comment that Wilson's claim of innocence "didn't sound too good," *id*., at 439-440, n. 1, Wilson's confessions were used to prosecute him. *Id*., at 440.

When *Wilson* reached the Supreme Court, this Court found that even though police had intentionally placed the accused in the cell with a prisoner who had agreed to act as a government informant, Sixth Amendment rights were not violated so long as the informant acted only as a listening post. Relevant to the decision were the facts that the informant had not " 'asked any questions' of respondent [Wilson] concerning the pending charges, and that he 'only listened' to respondent's 'spontaneous' and 'unsolicited' statements." *Id*., at 460. So, in the absence of "deliberate elicitation," no constitutional violation had occurred. *Id*., at 460-461. While the holding acknowledged that *Henry* generally controls, *Henry* was limited because the *Henry* Court had not addressed whether the Sixth Amendment was violated when a jailhouse informant passively listened

to the accused. See *id*., at 456. The specific rule controls a general rule, and therefore, *Wilson* is precedent when a jailhouse informant only listens. *Ibid*.

When it came to whether the Sixth Amendment protected the accused from a passive listener, *Wilson* returned to reasoning similar to that embraced in *Hoffa*. See *supra*, at 12. Just as *Hoffa* had found no Fourth Amendment violation for information disclosed to informant or eavesdropper, *Wilson* held "the defendant must demonstrate that the police and their informant took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks." *Wilson*, 477 U. S., at 459. Wilson's confession, like Ventris's, was obtained without evidence of deliberate elicitation. *Id*., at 460. The officer had instructed the informant just to listen in case Wilson mentioned the identities of his criminal cohorts. *Ibid*. The police were not looking for Wilson's confession because, like Ventris, they already had eyewitness testimony linking Wilson to the crime. *Ibid*.; *Ventris*, 285 Kan., at 597, 176 P. 3d, at 923. Furthermore, the informer's sole remark, that Wilson's story "didn't sound too good," *Wilson*, *supra,* at 460, bears a strong resemblance to Doser's statement that he could tell "something more serious [was] weighing on [Ventris's] mind." *Ventris*, *supra*, at 616, 176 P. 3d, at 934 (McFarland, C.J., dissenting). Significantly, *Wilson* omitted from its discussion the factors that *Henry* had found relevant. The factors of confinement and the close relationship of the government informant to the accused had no bearing on the new Sixth Amendment protection against "techniques that are the equivalent of direct interrogation." *Wilson*, *supra*, at 459. Wilson illustrates that mere placement of an informant in a cell is not a violation of *Massiah*.

Wilson made clear what *Henry* had left in doubt. Surreptitious placement of an informant is acceptable; interrogation or its equivalent to obtain a confession is not. Placement of an informant in the proximity of an accused by itself does not constitute a "critical stage" requiring the presence of counsel. As the last case on this issue, *Wilson*'s interpretation of the *Massiah* right controls. The risk Ventris took when he confided in Doser is not the fault of the State. To uphold such a conclusion would exceed *Wilson*'s understanding that "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Ibid*.

Illinois v. *Perkins*, 496 U. S. 292 (1990), does not require a contrary conclusion. A passing comment in *Perkins* summarized the *Massiah* line as holding "that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime. After charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel." *Id*., at 299 (citation omitted).

However, this passage in *Perkins* is dicta, and it does not change the rule laid down in *Wilson*. In *Perkins*, a defendant was charged and incarcerated for a crime unrelated to the murder that an undercover agent was investigating. *Id*., at 294. The agent was placed in the jail, and, during incarceration, Perkins made incriminating statements to the agent that ultimately led to Perkins being charged for murder. *Id*., at 294-295. In concluding there had been no "incommunicado interrogation of individuals in a police dominated atmosphere[,]" *id*., at 296 (citations omitted), and consequently no Fifth Amendment violation, this Court noted "our Sixth Amendment precedents are not applicable." *Id*., at 299. The Court then went on to

briefly discuss *Massiah* and *Henry*. *Ibid*. The brief discussion of the scope of the Sixth Amendment right after a holding that the Sixth Amendment is inapplicable is *obiter dictum*. It is the holding of *Wilson*, not the dicta of *Perkins* that the Court must attend. See *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U. S. 375, 379 (1994).

Maine v. *Moulton*, 474 U. S. 159 (1985), decided a few months before *Wilson*, is distinguishable from *Wilson* and the present case. In *Moulton*, the co-defendant feigned forgetfulness to induce Moulton to make incriminating statements as police listened in. *Id*., at 165-166. This was seen as a way of "knowingly circumventing the accused's right to have counsel present *in a confrontation* between the accused and a state agent." *Id*., at 176 (emphasis added). Distinguishing *Moulton* on grounds that the police had circumvented the Sixth Amendment in order to confront and directly interrogate Moulton, *Wilson* clarified that "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Wilson*, 477 U. S., at 459.

That equivalence is the key. Whether incriminating statements are elicited surreptitiously or openly is "constitutionally irrelevant." *Brewer* v. *Williams,* 430 U. S. 387, 400 (1977). *Wilson* controls this case. There is no material difference in the facts. See *supra*, at 15. Doser's testimony was admissible.

IV. *Massiah* should not be extended any further.

Massiah v. *United States*, 377 U. S. 201 (1964), was a revolutionary—and "strangely durable"—decision. The revolution occurred as this Court chose a tradi-

tional trial right to regulate how the government investigated the accused before trial. The decision is "strangely durable" given that this Court has never adequately explained or satisfactorily grounded the right in Sixth Amendment principles. See Uviller, Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 Colum. L. Rev. 1137, 1155 (1987). Without addressing why the right to counsel is constitutionally required in *Massiah*-type interrogation, this Court has consistently recognized a defendant is entitled to counsel during interrogation once he reaches the status of "accused." See Part II-B, *supra*, at 10-11. But *Massiah* has its limits. There can be no Sixth Amendment violation if a confession is obtained outside the "critical stage" where assistance of an attorney is necessary.

The classical justification for the right to counsel is found in *Powell* v. *Alabama*, 287 U. S. 45 (1932).

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence,

how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.*, at 69.

Powell thereby established a Sixth Amendment right at the "critical" stages of prosecution. *Id.*, at 57. Typically, critical is seen as a stage at trial, but it can also apply to pretrial events. See *ibid.* Relevant here is this Court's repeated recognition of the Sixth Amendment's courtroom origins. Quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972), *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984), stated, "given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from mere formalism.' " "[C]ritical confrontations with his adversary" evokes an image of the question and answer session between a practiced interrogator, such as a prosecutor or police officer, and a defendant. The same language does not evoke the image of two cellmates engaged in a discussion of their criminal escapades. Even cases that created a rule of exclusion for certain methods of police interrogation, like *Henry*, *Massiah*, and *Moulton*, did so because the nature of a police adversary's conduct was so similar to the type of interrogation that occurred at trial that a contrary conclusion was implausible. See *Michigan* v. *Jackson*, 475 U. S. 625, 641, n. 4 (1986) (Rehnquist, J., dissenting).

Perhaps this is why the broad definition of "critical" that carried the day in *Massiah* and *Henry* has been reined in by this Court's more recent decisions. In *Moran* v. *Burbine*, 475 U. S. 412, 431 (1986), for example, this Court stated, "We do not doubt that a lawyer's presence could be of value to the suspect; and we readily agree that, if a suspect confesses, his attorney's case at trial will be that much more difficult." But,

these concerns are not decisive "[f]or an interrogation, no more or less than for any other 'critical' pre-trial event, the possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel." *Id.*, at 432.

The basic formula for triggering a right to counsel remains unchanged; the right is triggered when adversarial judicial proceedings commence. *Rothgery* v. *Gillespie County*, 554 U. S. __, 128 S. Ct. 2578, 2583, 171 L. Ed. 2d 366, 374 (2008). Once the right is triggered, though, presence of counsel is only required for critical stages. See *id.*, 128 S. Ct., at 2591, 171 L. Ed. 2d, at 382; *id.*, 128 S. Ct., at 2594, 171 L. Ed. 2d, at 386 (Alito, J., concurring).

In jail cells, the need for an advocate is significantly limited. Unless the accused is being directly interrogated, the threshold for the "critical stage" has not been met. In *Illinois* v. *Perkins*, 496 U. S. 292 (1990), a decision addressing *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court "reject[ed] the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent." *Perkins*, 496 U. S., at 297. Reasoning that "the premise of *Miranda*[, was] that the danger of coercion results from the interaction of custody and official interrogation," this Court found "no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent in the hope of more lenient treatment should he confess." *Id.*, at 296-297. As the *Wilson* Court had stated, the *Massiah* line of cases is primarily concerned with a need to protect against "secret interrogation by investigatory techniques," *Wilson*, 477 U. S., at 459, that need is absent unless

there was some evidence of interrogation or its equivalent.

United States v. *Wade*, 388 U. S. 218, 227 (1967), held that the Sixth Amendment "requires [this Court to] scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." But see *supra*, at 10. *Wade* recognized this right to counsel at a pretrial lineup. *Id*., at 236-237. Certain efforts to identify the accused, like fingerprints, blood samples, hair, and clothing, did not require the presence of counsel, because defense experts and cross-examination could effectively counter that evidence. A lineup was different because it posed a risk of misidentification of the perpetrator that could not be corrected, and therefore it detracted from the defendant's right to a fair trial. *Id*., at 227-228. A lineup required someone with counsel's knowledge of the problems and practices of lineups that result in a wrongful identification, *id*., at 230-231, because "the confrontation compelled by the State between the accused and the victim or witness to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id*., at 228. "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id*., at 231-232.

The same is not true for courtroom testimony from a jailhouse informant. In jail, the informant is just another inmate, not a trained professional. In court, the jailhouse informant comes before the jury with his

credibility already under suspicion. Jurors are aware that the informant came from jail, and may be advised that they must consider the informant's testimony "with caution." See *State* v. *Ventris*, 285 Kan. 595, 599, 176 P. 3d 920, 924 (2008); J. A. 30. At trial, the defendant, or his counsel, has ample opportunity to further attack the credibility of the informant's testimony through direct confrontation. Cf. *Wade*, 388 U. S., at 232. It is then up to the jury to determine which biased testimony to believe. As a practical matter, extending the right to counsel to this situation would effectively ban the use of informants. As Justice Jackson pointed out, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances," *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (opinion concurring in the result). The same is obviously true for cellmates.

Defendant protests that in this particular case the government did not insure the veracity of the informant's testimony by recording the conversations in the jail cell. See Brief in Opposition 8; cf. *Massiah*, 377 U. S., at 202-203. However, the rule promulgated by the Kansas Supreme Court in this case is not limited to unrecorded or unreliable statements. Even the highly reliable evidence of a recorded confession of the defendant made in a completely uncoerced conversation would be excluded under this rule.

The highly probative evidence of the defendant's freely given confession in his own recorded words would, of course, make conviction nearly certain. However, a fair trial does not mean one where each party has a good chance of winning. A trial is not supposed to be a handicapped sporting event. See Uviller, Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 Colum. L. Rev. 1137, 1173-

1175 (1987). The purpose of a trial is to ascertain the truth. See *Ohler* v. *United States*, 529 U. S. 753, 763-764 (2000) (Souter, J., dissenting). A rule that excludes evidence without any regard for its reliability, as the Kansas Supreme Court's rule would, does not advance that function. See *Portuondo* v. *Agard*, 529 U. S. 61, 79 (2000) (Ginsburg, J., dissenting). Of course, reliable, conclusive evidence may predetermine the outcome of the trial, see *Wade*, 388 U. S., at 225-226, but that does not make the obtaining of the evidence unfair. A voluntary, preindictment, out-of-custody confession or conclusive forensic evidence will do the same, but no serious argument could be made that they should be excluded.

In this case, the defendant's statement was not recorded but instead was related by a dubious jailbird. The prosecution has already paid a heavy price for this misstep. The jury was unwilling to place the requisite degree of confidence in Doser and acquitted Ventris of the murder. They only convicted him of the burglary and robbery, crimes confirmed by independent testimony, including Ventris's donning a mask before going to the victim's house. See *supra*, at 2. The jury received the evidence with the appropriate degree of skepticism.

Massiah is an exception to the general rule that the right to counsel guards against wrongful convictions through effective assistance in the trial itself and in counsel's own preparation for it. Absent a special threat to a fair trial, or initiation of complex legal proceedings, the presence of counsel is neither critical nor required. *Massiah*'s "strangely durable" precedent operates to protect the defendant during police interrogation or its equivalent, but it should not be extended any further.

Leaving the Kansas Supreme Court's opinion undisturbed on the underlying Sixth Amendment question could have a serious and injurious impact on law enforcement. If the law is "clearly established," at least in Kansas, that what the police did in this case is a violation of the Sixth Amendment, both the municipalities and the officers personally may be liable for damages in civil actions in any future cases similar to this one. See Brief for Petitioner 25-28. However, the tactics of the police in this case are not materially distinguishable from those upheld in *Wilson*. See *supra*, at 15. To strip peace officers of their immunity when their actions are fully consistent with a precedent of this Court would be intolerable.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

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Respectfully submitted,

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
Attorneys for Amicus Curiae
Criminal Justice Legal Foundation